

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BUNGIE, INC., a Delaware corporation,

Plaintiff

v.

AIMJUNKIES.COM, a business of unknown
classification; PHOENIX DIGITAL GROUP
LLC, an Arizona limited liability company;
JEFFREY CONWAY, an individual; DAVID
SCHAEFER, an individual; JORDAN GREEN,
an individual; and JAMES MAY, an individual,

Defendants.

Cause No. 2:21-cv-0811 TSZ

**DEFENDANTS' SURREPLY IN
OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

(REDACTED)

For reasons stated herein, Defendants, by and through their undersigned counsel, respectfully request that the Court strike the supplemental declaration of Dr. Edward Kaiser (DKT#183) to the extent it purports to blame third party NovaCoast for breaching Defendant Phoenix Digital Group LLC's Terms of Service. Defendants further request that this Court strike Bungie's argument at page 17 of its Reply Brief (Dkt#182) that, "Phoenix Digital has also failed to offer any facts (as opposed to faulty opinion) that the third party that created the documents was an agent of Bungie, or that the documents themselves even evidence a breach of the Terms of Service (they don't)."

These facts and arguments were not only never raised in Bungie's opening motion for summary judgment, this is the first time in this entire case that Bungie has even claimed that "NovaCoast," and not it, was responsible for breaching Phoenix Digital's Terms of Service.

ARGUMENT

Bungie itself has previously informed this Court that, “It is well-established in this Court that ‘[a]rguments cannot be raised properly for the first time on reply,’” citing *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1171 (W.D. Wash. 2010); *AT & T Mobility LLC v. Holaday-Parks-Fabricators, Inc.*, No. C10-468Z, 2011 WL 5825714, at *2 (W.D. Wash. Nov. 17, 2011) (Zilly, J.) (granting motion to disregard arguments asserted in support of motion to dismiss asserted for the first time in reply), and *Nw. Coal. for Alts. To Pesticides v. U.S. E.P.A.*, No. C10-1919 TSZ, 2014 WL 309168, at *4 (W.D. Wash. Jan. 28, 2014) (Zilly, J.) (granting motion to strike “new argument improperly raised for the first time in Intervenor’s reply” in support of a motion to dismiss). (See DKT#58, p.2.)

Bungie has never before argued that it was NovaCoast and not it that performed an unrequested analysis of the “cheat” software it obtained from Phoenix Digital, and Bungie has never before argued that NovaCoast did not engage in its activities at the request of Bungie, or that NovaCoast was somehow *not* an agent of Bungie. These arguments not only appear for the very first time in Bungie’s Reply Brief and in the Supplemental Declaration of Dr. Kaiser, they are blatantly untrue in light of documents Bungie itself has produced in this matter.

The accompanying exhibits A, B, C and D to the Declaration of Philip P. Mann are true and correct copies of emails, produced by Bungie, exchanged among numerous employees and agents of Bungie, NovaCoast and another third-party, [REDACTED]. Furthermore, a perusal of these emails clearly indicate that as early as September 8, 2020, Bungie stated to NovaCoast and [REDACTED] that, [REDACTED]. [REDACTED] (Mann Declaration Exhibit A, p. 3.) These emails further reveal that, on [REDACTED], Bungie had internal discussions regarding the services NovaCoast and [REDACTED] could provide (Mann Dec. Exh. B) and that on [REDACTED] Bungie, itself, said to representatives of NovaCoast and [REDACTED]. [REDACTED]

[REDACTED]

[REDACTED] (Mann Dec. Exh. C.) Finally, on January 6, 2021, [REDACTED] of NovaCoast emailed several redacted named recipients at Bungie, stating, [REDACTED]

[REDACTED]

[REDACTED] (Mann Dec. Exh. D.)

Based on these emails, produced by Bungie itself, there is more than sufficient evidence for a reasonable jury to conclude that, even if the nefarious activities complained of were carried out by NovaCoast and not Bungie itself, there nevertheless existed a “partnership” or “agreement” or other relationship sufficient to establish NovaCoast as the agent of Bungie.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that the Supplemental Declaration of Dr. Kaiser be stricken along with the arguments made in section “3.” appearing on page 17 of Bungie’s Reply in Support of its Motion for Summary Judgment. Such action by this Court is respectfully requested.

Dated August 17, 2023.

/s/ Philip P. Mann

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I certify that this memorandum contains 931 words, in compliance with the Local Civil Rules.